

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA ,

CASE NO. 13CR1129 WQH

Plaintiff. | ORDER

DAVID HEDLEY,

Defendant.

HAYES, Judge:

ORDER

14 HAYES, Judge:
15 The matter before the Court is the payment of restitution by Defendant David
16 Hedley.

BACKGROUND FACTS

18 Defendant was employed as the Executive Director of the Indian Human
19 Resources Center (IHRC) between approximately September 10, 2012 and December
20 11, 2012. During this period, the Department of Health and Human Services wired
21 federal moneys from the Workforce Investment Act to IHRC's credit union account on
22 behalf of the Department of Labor.

23 On March 28, 2013, the grand jury returned an indictment charging Defendant
24 with eight counts of theft concerning programs receiving federal funds in violation of
25 18 U.S.C. § 666(a)(1)(A).

On August 6, 2013, Defendant entered a plea of guilty to Count 1 of the Indictment charging a violation of 18 U.S.C. § 666(a)(1)(A) Theft concerning programs receiving federal funds in the amount of \$5,000. In the factual basis of the plea

1 agreement, Defendant admitted:

2 Between September 24, 2012 and December 6, 2012, Defendant
3 knowingly embezzled, that is, fraudulently converted or appropriated for
4 his own personal use, approximately \$141,260.44 from IHRC, which
5 constituted federal funds in the care, custody or control of IHRC.
6 ECF No. 37 at 4. Defendant further agreed that he “falsely represented to employees
7 of the credit union and other persons that he was using the money from IHRC on behalf
8 of the non-profit organization, when in fact Defendant was diverting all or part of the
9 money for his personal benefit or gain.” *Id.* In addition, Defendant further admitted
10 that he “conspired with [another IHRC employee] to transfer funds into the IHRC’s
11 discretionary account from other IHRC [credit union] accounts” and “to cover or
12 backfill the funds in the other accounts by ‘drawing down’ on the federal grant from
13 HHS.” *Id.* Defendant admitted that he paid the other IHRC employee “at least \$3,500
14 as payment for her assistance in his scheme to defraud IHRC by embezzling federal
15 funds.” *Id.* at 5.

16 In the Plea Agreement, Defendant
17 agree[d] that the amount of restitution ordered by the court shall include
18 defendant’s total offense conduct, and is not limited to the count of
19 conviction. Accordingly, the parties will jointly recommend that
20 defendant pay restitution in the amount of \$141,260.44 which the Court
21 shall order payable forthwith.

22 *Id.* at 12.

23 On April 3, 2014, the Court ordered the Government to provide a listing of the
24 amounts subject to restitution to the probation office.

25 On April 17, 2014, the Government filed a Restitution Memorandum requesting
26 that the Court order restitution in the amount of \$141,260.44 to the Department of
27 Labor. Attached to the Government’s Restitution Memorandum was a CORPORATE
28 VICTIM IMPACT/FINANCIAL STATEMENT from the Indian Human Resource
Center (IHRC) stating an actual loss of “\$147,000 in administrative costs and program
costs and \$16,576 salary paid to Hedley.” (ECF No. 71-2 at 2). The Government did
not recommend any restitution to IHRC.

29 On April 24, 2014, Probation filed an addendum recommending that Defendant

1 pay restitution in the amount of \$141,260.44 to the U.S. Department of Labor and no
 2 restitution to IHRC.

3 On May 29, 2014, the Government filed a Supplemental Restitution
 4 Memorandum which stated in part: “SA Phan has independently calculated the payroll
 5 direct deposits to Defendant as \$9,276.17 total, which includes \$7,730.14 paid to
 6 Hedley during the period of criminal activity.” This statement is supported in the
 7 record by Phan Declaration at paragraphs 9 and 10. (ECF No. 79-1 at 3).

8 On July 28, 2014, Defendant filed a Restitution Memorandum (ECF No. 85)
 9 objecting to any order of restitution to IHRC. Defendant contends that the offense of
 10 conviction excludes “bona fide salaries” so restitution should exclude salary payments,
 11 that the IHRC is not a victim under the Mandatory Restitution Act, and that
 12 Defendant’s criminal conduct was not the proximate cause of IHRC salary loss.
 13 Defendant asserts that IHRC failed to check his background which would have revealed
 14 his criminal history, fraudulent claim to be an attorney, and lack of qualification.
 15 Defendant contends that IHRC was negligent in hiring him and caused the loss of
 16 salary.

17 On August 25, 2014, the Court held a hearing regarding restitution.¹

18 RULING OF THE COURT

19 \$141,260.44 to the Department of Labor

20 Pursuant to the agreement of the parties and based upon the record, the Court will
 21 order restitution agreed to in plea agreement of the amount of \$141,260.44 to the
 22 Department of Labor.

23 Restitution to IHRC

24 The Mandatory Victims Restitution Act (the Act) makes restitution mandatory
 25 for offenses which involve fraud or deceit. 18 U.S.C. § 3663A(c)(1)(A)(ii). Restitution
 26 is mandatory for any offense “in which an identifiable victim or victims has suffered
 27 a . . . pecuniary loss.” 18 U.S.C. § 3663A(c)(1)(B). The Act provides that “the court

28 ¹The Government and the Defendant made legal argument.

1 shall order restitution to each victim in the full amount of each victim's losses as
 2 determined by the court and without consideration of the economic circumstances of
 3 the defendant." 18 U.S.C. § 3664(f)(1)(A). "[A]ctual loss for restitution purposes is
 4 determined by comparing what actually happened with what would have happened if
 5 the defendant had acted lawfully." *United States v. Hunter*, 618 F.3d 1062, 1064 (9th
 6 Cir. 2010)(internal citation omitted).

7 Under the Act, a victim is "a person directly and proximately harmed as a result
 8 of the commission of an offense for which restitution may be ordered." 18 U.S.C. §
 9 3663A(a)(2). Based upon the Defendant's admissions in the plea agreement, the Court
 10 finds that IHRC was directly and proximately harmed as a result of the Defendant's
 11 embezzlement and conspiracy to cover up the embezzlement. IHRC is a victim under
 12 the Act.

13 "Restitution can only be based on actual loss." *United States v. Xu*, 706 F.3d
 14 965, 994 (9th Cir. 2013)(internal citations omitted). A restitution order must also be
 15 "based on losses directly resulting from a defendant's offense." *United States v. Bussell*,
 16 504 F.3d 956, 964 (9th Cir. 2007). The "purpose of restitution" under the
 17 MVRA, however, is not to punish the defendant, but to "make the victim[] whole" again
 18 by restoring to him or her the value of the losses suffered as a result of the defendant's
 19 crime. *United States v. Crandall*, 525 F.3d 907, 916 (9th Cir.2008) (quoting *United*
 20 *States v. Gordon*, 393 F.3d 1044, 1052 n. 6 (9th Cir.2004)).

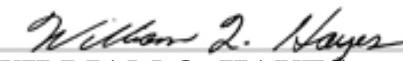
21 In this case, the Court must determine whether the payment of salary to
 22 Defendant by IHRC was a loss suffered "directly and proximately" as a result of
 23 Defendant's offense conduct. 18 U.S.C. § 3663A(a)(2). Defendant admitted that
 24 "[b]etween September 24, 2012 and December 6, 2012, Defendant knowingly
 25 embezzled, that is, fraudulently converted or appropriated for his own personal use,
 26 approximately \$141,260.44 from IHRC, which constituted federal funds in the care,
 27 custody or control of IHRC." In addition, Defendant admitted that he conspired with
 28 another employee to cover up the scheme by having funds transferred to an account.

1 The record establishes conclusively that IHRC paid salary to the Defendant in the
 2 amount of \$7,730.14 during the period of his criminal activity. The Presentence Report
 3 states that when the Chairman of the Board for IHRC became aware of the
 4 embezzlement "HEDLEY was immediately fired." (ECF No. 53 at 4).²

5 Defendant's relevant conduct includes embezzling money and conspiring with
 6 another employer to cover it up between September 24, 2012 and December 6, 2012.
 7 Based upon undisputed facts, the Court finds that IHRC would not have paid Defendant
 8 wages in the amount of \$7,730.14 if Defendant had not acted unlawfully by embezzling
 9 money and conspired with another employer to cover it up. Defendant not only
 10 embezzled money during this period, he prevented his employer from discovering the
 11 embezzlement by conspiring with other IHRC employees to avoid detection.
 12 Defendant's offense conduct was the proximate cause of IHRC's continuing to employ
 13 him and pay him salary. There is no authority for the Defendant's assertion that IHRC
 14 is not entitled to restitution for actual losses caused by the offense on the grounds that
 15 it was negligent and caused its own loss. In this case, Defendant admitted that he
 16 committed fraud, and that he conspired to cover up his fraud. As a result, Defendant
 17 continued his employment and received his salary. There are no facts material relevant
 18 to the payment of restitution that require an evidentiary hearing.

19 At the time of sentencing, the Court will order restitution in the amount of
 20 \$141,260.44 to the Department of Labor and in the amount of \$7,730.14 to the Indian
 21 Human Resource Center.

22 DATED: October 17, 2014

23 
 24 WILLIAM Q. HAYES
 25 United States District Judge

26
 27
 28 ² No objection has been filed to this factual statement.